No. 95-620

In the Supreme Court of the United States

OCTOBER TERM, 1995

ACTION FOR CHILDREN'S TELEVISION, ET AL.,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the statutes governing the enforcement of the federal limitations on the broadcast of indecent programming are unconstitutional, either on their face or as generally applied by the Federal Communications Commission.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 59 F.3d 1249. The opinion of the district court (Pet. App. 31a-62a) is reported at 827 F. Supp. 4.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 1995. The petition for a writ of certiorari was filed on October 16, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves a constitutional challenge to the procedures by which the Federal Communications Commission (FCC or Commission) enforces the limitations governing the broadcast of indecent programming.

1. Section 503(b) of the Communications Act of 1934, 47 U.S.C. 503(b) (1988 & Supp. V 1993), authorizes the FCC to impose a monetary forfeiture for violations of various statutory provisions, including 18 U.S.C. 1464, which generally prohibits the broadcast of "obscene, indecent, or profane language." 47 U.S.C. 503(b)(1)(D) (Supp. V 1993). See generally *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978).[1]

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[1] The substantive contours of the government's power to regulate indecent broadcast programming, which are not at issue in this case (Pet. App. 3a), have been the subject of a lengthy separate litigation. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988) (remanding FCC's decision to restrict indecent programming to hours after midnight); *Action for Children's Television* v. *FCC*, 932 F.2d 1504 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992) (invalidating 24 hour-a-day ban on such programming). In Section 16(a) of the Public Telecommunications Act of 1992, Pub. L. No. 102-356, 106 Stat. 954, codified at 47 U.S.C. 303 note (Supp. V 1993), Congress instructed the FCC to promulgate regulations generally prohibiting indecent broadcasting between the hours of "6 a.m. and 12 midnight." In *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), petitions for cert., Nos. 95-509 (filed Sept. 26, 1995) & 95-520 (filed Sept. 28, 1995), that statute and the FCC's regulations were invalidated to the extent they prohibited indecent broadcast programming between 10 p.m. and midnight.

The FCC generally initiates broadcast indecency forfeiture proceedings after receiving an indecency complaint from a listener or viewer that is accompanied by a tape or transcript of significant excerpts of the offending programming, as well as information identifying the station and the date and time of the broadcast. Pet. App. 4a; C.A. App. 41-42 (Stipulation of Fact No. 9). If a complaint contains the required information, it is examined by the Commission's staff to determine whether the matter warrants further investigation. If not, the complaint is dismissed. If the complaint is not dismissed, a "Letter of Inquiry" (LOI) often is sent requesting further information from the broadcaster named in the complaint. Pet. App. 33a.

After further consideration, if the Commission's staff determines that such action is warranted, a "Notice of Apparent Liability" (NAL) is issued. The NAL sets forth the facts underlying the agency's claim that the relevant law or regulations were violated, and gives the person an opportunity (generally 30 days) to submit materials in its defense. 47 U.S.C. 503(b)(4); 47 C.F.R. 1.80(f)(3).[2] The Com-

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[2] Under 47 U.S.C. 504(c),

> [i]n any case where the Commission issues a [NAL] looking toward the imposition of a forfeiture * * *, that fact shall not be used, in any other proceeding before the Commission, to the prejudice of the person to whom such notice was issued, unless (i) the forfeiture has been paid, or (ii) a court of competent jurisdiction has ordered payment of such forfeiture, and such order has become final.

Petitioners originally asserted that the FCC violates that provision in administering the broadcast indecency scheme. The courts below refused to entertain that statutory claim on the ground that it was within the FCC's primary jurisdiction,

mission or its Mass Media Bureau then reviews the broadcaster's response (if any) to the NAL, and determines whether a forfeiture is warranted. Pet. App. 34a.[3]

In determining the amount of any forfeiture, the Commission is required to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. 503(b)(2)(D) (Supp. V 1993). In no event may a forfeiture penalty exceed $25,000 for each violation, or each day of a continuing violation. 47 U.S.C. 503(b)(2)(A) (Supp. V 1993). A forfeiture for a continuing violation arising out of a single act or omission may not exceed $250,000 in total. *Ibid.*

A forfeiture penalty is due and payable once it has been imposed by the Commission. Any person may refuse to pay the penalty, however, and force the FCC to refer the matter to the U.S. Attorney's Office for collection in a trial *de novo* in federal district court. 47 U.S.C. 504(a).

2. This case was commenced by various broadcasters and broadcast organizations, joined by several organizations representing listeners and viewers, who sued in federal district court to challenge the

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see Pet. App. 9a-12a, 43a-45a, and petitioners have abandoned it in this Court. See Pet. 10 n.11.

[3] The statute also authorizes the FCC, in its discretion, to impose a forfeiture after holding a formal administrative hearing, with review of the agency's decision in the court of appeals under the Administrative Procedure Act. 47 U.S.C. 503(b)(3). Although it reserves the right to do so, 47 C.F.R. 1.80(g), the FCC currently does not use that procedure to impose a forfeiture for broadcast indecency. Pet. App. 3a.

lawfulness of the procedures by which the FCC enforces the prohibitions against broadcast indecency. Petitioners contended that the regulatory scheme as administered by the FCC unconstitutionally restrains their expression. The parties filed motions for summary judgment on a stipulated record, and the district court granted judgment for the government.

After rejecting the contention that petitioners' constitutional claims fell within the exclusive jurisdiction of the court of appeals, Pet. App. 41a-43a, the district court held that the claims of only petitioner Infinity Broadcasting Corporation (Infinity) were properly before it. Pet. App. 45a-52a. Relying on controlling circuit precedent, the court found that the organizations representing listeners and viewers lacked standing to assert their challenge to the FCC's indecency forfeiture proceedings. Pet. App. 45a-46a. The court came to the same conclusion regarding the broadcast petitioners that had never been involved in a forfeiture proceeding, reasoning that they could not show that they had suffered any injury from the challenged procedures. Pet. App. 47a-48a. The court also dismissed on ripeness grounds the claims of those broadcasters who had not had final forfeiture orders entered against them, observing that the FCC might decide not to impose a forfeiture. Pet. App. 50a-51a. Finally, the court dismissed the claims of petitioner Evergreen Media on grounds of comity, explaining that Evergreen was challenging the forfeiture order entered against it in a lawsuit pending in another district. Pet. App. 52a.

On the merits, the district court upheld the constitutionality of the broadcast indecency forfeiture procedures. Distinguishing the actions of the Rhode Island commission condemned by this Court in

Bantam Books, Inc. v. *Sullivan*, 372 U.S. 58 (1963), the court found that the FCC is not engaged in "the prior review and censorship of broadcast material," but is instead enforcing a "court-approved definition of indecency through a system that provides for notice and judicial review." Pet. App. 59a.

3. The court of appeals affirmed. It agreed with the district court that petitioner Infinity had standing and that its claims were ripe for adjudication. Pet. App. 12a-14a. The court also agreed that the FCC is "not operating a scheme of informal censorship like the one held unconstitutional in Bantam Books." Pet. App. 14a.

The court of appeals rejected petitioners' facial challenge to the forfeiture provisions, finding that the provisions are "clearly capable of constitutional application." Pet. App. 16a. As the court explained, "nothing in the statutes or regulations prevents the Commission from issuing a NAL, imposing a forfeiture, and if need be referring a case to the Department of Justice all within a period of time short enough virtually to eliminate any concern with delay." Pet. App. 15a (suggesting that "[t]he whole course could probably be run in most cases within, say, 90 days").

The court also upheld the constitutionality of the broadcast indecency regulation scheme as generally applied by the Commission. As the court observed, "the Commission is not administering anything akin to a literal prior restraint." Pet. App. 18a. "Broadcasters are free to air what they want; if and only if what they air turns out to transgress established guidelines do they face a penalty—but that is very much after the fact, not prior thereto." *Ibid.*

In addition, the court observed, the regulatory scheme did not constitute a "prior restraint in effect," since it would not "cause[] a speaker of reasonable fortitude to censor itself in order to conform with an unconstitutional standard." Pet. App. 18a. Among other things, the court emphasized, it had no evidence that the FCC "is * * * enforcing the statutory ban on indecency against material that is not indecent," or that it "has done anything actively to discourage judicial review of any indecency forfeiture it imposed," or that it "has failed or will fail to follow judicial guidelines for determining what is indecent and what is not." Pet. App. 18a-19a.

Finally, the court pointed to "[t]wo avenues of relief" open to any broadcaster concerned about excessive delay in the administration of the broadcast indecency scheme. Pet. App. 21a. First, the court observed, a broadcaster could "stipulate [to] the facts giving rise to the Notice of Apparent Liability and state that it will not pay the forfeiture unless ordered to do so in district court." *Ibid.* That would allow the FCC to refer the matter immediately to the Justice Department, thereby expediting the broadcaster's opportunity for a judicial trial on the merits. *Ibid.* In the alternative, the court suggested, a broadcaster "suffering from demonstrably adverse consequences from government delay in initiating the collection proceeding" could file an action seeking a declaratory judgment that the material in question is not indecent, and in that manner "dispel any unwarranted chilling effect." Pet. App. 22a.[4]

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[4] Chief Judge Edwards, concurring, emphasized that petitioners had "failed to show that speech that is not indecent is in fact being chilled." Pet. App. 24a. Judge Tatel dissented.

ARGUMENT

The court below held that it had jurisdiction over the claims of only one petitioner—Infinity. In September of this year, however, Infinity executed a settlement agreement with the government that disposed of all of the pending indecency forfeiture actions against it. By reason of that settlement, Infinity no longer has a concrete stake in the outcome of the claims it asserts in this case. Because the petition for certiorari does not seek to review the district court's dismissal of the claims asserted by any of the other petitioners for lack of standing or ripeness, and because Infinity is no longer subject to any indecency proceedings, the petition should be denied.

The decision below is also the first by any court of appeals to address the constitutionality of the procedures by which the FCC enforces the statutory limitations against the broadcast of indecent programming. Because the decision does not conflict with that of any other court and correctly disposes of the issues presented by this case, further review is not warranted.

1. As petitioners acknowledge (Pet. 7), on September 1, 1995, Infinity entered into a comprehensive settlement agreement with the FCC and the Department of Justice that disposed of all pending indecency forfeiture matters against it.

Pursuant to that agreement, the FCC vacated the pending forfeiture order and NALs that had been issued against Infinity, and ordered its Mass Media

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In his view, the case should have been remanded to the district court "to establish procedures to facilitate prompt judicial review of forfeiture determinations." Pet. App. 30a.

Bureau to dismiss "as to Infinity * * * all pending complaints that either involve programming aired or originated by Infinity." *Sagittarius Broadcasting Corp.*, FCC No. 95-386, 1995 WL 521389 (Sept. 1, 1995), at 2. The FCC also agreed to treat the forfeiture, the NALs and the pending complaints "as null, void, and expunged from Infinity's record for all purposes, including, but not limited to, any future qualifications issue, future licensing proceeding or future transfer of control or assignment of license or permit involving Infinity." *Id.* at 4. By reason of the settlement and the disposition of all pending indecency enforcement actions against it, Infinity is no longer suffering any concrete, imminent injury resulting from the FCC's enforcement of the broadcast indecency limitations. This Court therefore lacks jurisdiction to review its claim that the enforcement procedures are unconstitutional. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Petitioners briefly assert in a footnote in their statement of the case that the district court's dismissal of the constitutional claims of petitioners other than Infinity was "improper[]." Pet. 10 n.11. But nowhere in their questions presented (or elsewhere in the petition, for that matter) do petitioners raise the issues of standing, ripeness, and comity relied upon by the district court to dismiss those claims. See Pet. i, 12-22. Petitioners have thus failed to preserve those issues for review by this Court. Sup. Ct. R. 14.1(a); *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645 (1992).

In sum, Infinity has comprehensively settled the FCC's case against it, thus placing its standing and the ripeness of its claim in no different posture than

those of the other broadcast petitioners. In this Court, petitioners do not challenge the district court's disposition of the other petitioners' claims on standing, ripeness, and comity grounds. Since that disposition provides an independent and unchallenged basis for affirmance of the judgment below, petitioners are in no position to secure review by this Court of the claims they press in their petition.

2. Moreover, petitioners do not claim that there is any conflict among the circuits on the issues disposed of by the decision below. On the contrary, the court of appeals was the first to address the constitutionality of the FCC's broadcast indecency forfeiture scheme. Other broadcasters remain free to attempt to persuade another court of appeals that, despite the decision below, the Commission's enforcement of the broadcast indecency limitations is constitutionally defective. In addition, an individual broadcaster can also raise the same issues as part of its defense to a suit to collect an indecency forfeiture. See *United States* v. *Evergreen Media Corp.*, 832 F. Supp. 1179, 1183 (N.D. Ill. 1993). Unless and until a circuit conflict arises on the issues presented by this case, review by this Court would not be warranted even if the proffered issues were properly before this Court.[5]

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[5] There is no reason to hold this petition pending the disposition of *Pacifica Foundation* v. *FCC*, petition for cert., No. 95-509 (filed Sept. 26, 1995), and *Action for Children's Television* v. *FCC*, petition for cert., No. 95-520 (filed Sept. 28, 1995). Those cases involve the substance of the government's power to regulate indecent broadcast programming, not the procedures by which indecency restrictions are enforced. Nor should the petition in this case be held for disposition in light of *Denver Area Educational Telecommunications Consortium, Inc.* v. *FCC*, cert. granted, No. 95-124 (Nov. 13, 1995), and

3. There is no merit in any event to petitioners' claims that the broadcast indecency enforcement scheme constitutes a system of "informal censorship" or a prior restraint. Pet. 14. By statute, a broadcaster subject to an FCC indecency enforcement proceeding has the unrestricted right to a trial "de novo" in federal district court before it can be required to pay any forfeiture penalty. 47 U.S.C. 504(a). If the district court does not agree with the FCC's indecency determination, the broadcaster cannot be compelled to pay the forfeiture. There is thus no enforceable obligation to pay an FCC broadcast indecency forfeiture order until a district court has determined, after a trial, that the Commission's indecency determination is correct.

Petitioners assert that they nonetheless "attempt to conform their conduct to the indecency standards articulated by the FCC and its Commissioners, whether or not they believe those standards are constitutional." Pet. 12 n.15 (emphasis omitted). Because it is ordinarily assumed that persons will attempt to conform their conduct to federal law, as announced and enforced by the appropriate authorities, petitioners' voluntary efforts to do so do not convert the FCC's actions into a censorship scheme. As this Court has recognized, deterrence of unlawful conduct, even in the area of the First Amendment, is a "legitimate end" of government. *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 60

Alliance for Community Media, Inc. v. *FCC*, cert. granted, No. 95-227 (Nov. 13, 1995). Those cases involve the government's substantive power to regulate indecent programming under the entirely different regulatory scheme governing cable television; they too do not involve the procedures by which the regulations are enforced.

(1989); *Alexander* v. *United States*, 113 S. Ct. 2766, 2774 (1993). In this case, the court of appeals found, there is no basis on which to conclude that "the FCC is * * * enforcing the statutory ban on indecency against material that is not indecent." Pet. App. 18a. If petitioners disagree, however, they have only to refuse to pay any particular forfeiture and force the Commission to shoulder its burden of convincing a court that the material at issue is in fact indecent.

Because the FCC's forfeiture orders are not self-executing, petitioners err in asserting (Pet. 14-15) that the court of appeals' decision conflicts with a number of cases in which this Court has emphasized the need for prompt judicial review of prior restraints, see *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 556 (1975); *Freedman* v. *Maryland*, 380 U.S. 51, 60 (1965), or similar schemes under which government action to suppress speech took effect *before* the target of the action had the opportunity for judicial review, *Riley* v. *National Federation of the Blind*, 487 U.S. 781, 801-802 (1988) (professional fundraisers had "to await a determination regarding their license application before engaging in solicitation"); *Blount* v. *Rizzi*, 400 U.S. 410, 418-419 (1971) (once administrative order is entered, orders for magazines may be returned to senders and money orders may not be paid to publishers of magazines). Those cases provide no support for petitioners' contention that prompt judicial review is similarly essential where the governmental action takes effect only *after* judicial review occurs.

4. Petitioners err in asserting (Pet. 13-19) that the decision of the court of appeals conflicts with this Court's decision in *Bantam Books, Inc.* v. *Sullivan*,

372 U.S. 58 (1963). In *Bantam Books*, the Rhode Island Commission to Encourage Morality in Youth notified book distributors that certain publications had been found "to be objectionable for sale, distribution or display to youths under 18 years of age," *id.* at 61, and that the Commission had a "duty to recommend" criminal prosecution of purveyors of obscenity, *id.* at 62. The Rhode Island Commission also circulated copies of the list of objectionable items to local police departments, and local police typically visited distributors to follow up on the Commission's notice. *Id.* at 62-63. Those tactics had the effect of causing distributors to withdraw their materials from circulation while at the same time discouraging them from contesting the Commission's actions in court. *Id.* at 63-64. As this Court found, the Commission had "deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim." *Id.* at 67.

As the court of appeals explained, "[t]he lesson of *Bantam Books*" is that the government "may not move to suppress speech by means of a scheme that, as a practical matter, forecloses the speaker from obtaining a judicial determination of whether the targeted speech is unprotected, lest [it] be able effectively to suppress protected speech." Pet. App. 17a. No such obstacles to judicial review obtain in this case. As the court of appeals emphasized, there is simply "no indication" that the FCC has done anything "actively to discourage judicial review of any indecency forfeiture it imposed." Pet. App. 19a.[6]

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[6] That few indecency cases have come before the district courts does not suggest that review is being obstructed, since the dearth of such cases may be "the effect of any of several

Petitioners complain (Pet. 13) that they face delays in obtaining judicial review.[7] But since a broadcaster is not under an enforceable obligation to pay a forfeiture penalty until a district court has found in the Commission's favor, any delay in obtaining judicial review does not, by itself, unduly burden petitioners' speech. In any event, as the court of appeals noted (Pet. App. 21a-22a), broadcasters have available ways of expediting the enforcement process—including stipulating to the facts or announcing an intention not to pay—that can serve to minimize any delay.[8]

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inoffensive causes: the Commission has only recently stepped up its enforcement efforts; the violators penalized thus far may very well have broadcast the indecency as charged and thus see no point in contesting the forfeiture in court; and broadcasters may be self-censoring only indecent material, eliminating the need for many prosecutions." Pet. App. 19a.

[7] In addition to civil proceedings initiated by the FCC, a broadcaster may be the subject of a criminal prosecution for broadcasting obscene or indecent material in violation of 18 U.S.C. 1464. Under the limitations period generally applicable to federal criminal proceedings, an indictment can be brought up to five years after the date of the offense. See 18 U.S.C. 3282. That is approximately in the middle of the two- to seven-year period that a broadcaster can expect to wait before appearing in court to contest an FCC forfeiture. See Pet. App. 5a-6a. Under petitioner's theory, therefore, an "undoubtedly constitutional," Pet. App. 16a, criminal prosecution that is brought within the statutory limitations period would have to be dismissed as in violation of the First Amendment.

[8] In stark contrast, Infinity affirmatively took steps to delay judicial review after the FCC imposed a forfeiture of $6,000 on Infinity in October 1992. See *Liability of Sagittarius Broadcasting Corp.*, 7 F.C.C.R. 6873 (1992). Infinity petitioned the agency for reconsideration of the forfeiture order. The Commission denied Infinity's petition for reconsideration

Petitioners also allude to the fact that individual FCC Commissioners have on occasion made public statements exhorting broadcasters to adhere to the Commission's indecency determinations. Pet. 5-6. As petitioners are aware, however, statements by individual Commissioners do not constitute actions by the Commission itself. *Illinois Citizens Comm. for Broadcasting* v. *FCC*, 515 F.2d 397, 402 (D.C. Cir. 1975). Moreover, none of those statements does more than emphasize that individual Commissioners take seriously the Commission's indecency enforcement responsibilities. It is not improper for the Commissioners, who are public officials, to discuss their views as to Commission policies. Indeed, as this Court emphasized in *Bantam Books*, it has never suggested "that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws [regulating speech] * * * [w]here such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them." 372 U.S. at 71-72.

There are a number of other reasons why the claims of informal censorship in this case are "not nearly as compelling" as those asserted in *Bantam Books*. Pet App. 21a. For example, in *Bantam Books*, a particular concern was that the informal and unreviewable actions taken by the Rhode Island Commission to Encourage Morality in Youth were backed up with the threat of society's most severe punishment—a prosecution for violation of a criminal statute. See 372 U.S. at 68 ("People do not lightly

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in May 1993. See *Sagittarius Broadcasting Corp.*, 8 F.C.C.R. 3600 (1993).

disregard public officers' thinly veiled threats to institute criminal proceedings against them if they do not come around."). In this case, the FCC's actions are reviewed *de novo* in a civil proceeding to collect the amount of the forfeiture—a proceeding that is not likely to have a similar effect on broadcasters, who have generally been able in the past to represent their interests forcefully in court when they choose to do so. Moreover, this case, unlike *Bantam Books*, involves the regulation of broadcasting, which has historically received "the most limited First Amendment protection." *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978); see *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2456 (1994). Broadcasters also receive notice and an opportunity to be heard before the FCC makes any final determination of indecency. Compare 372 U.S. at 71. Lastly, while a bookseller seeking to avoid a dispute with the Rhode Island Commission had to cease selling the disputed books to anyone—child or adult—a broadcaster wishing to avoid a dispute with the FCC "need only move its arguably indecent material to a different time of day, not refrain from broadcasting it altogether." Pet. App. 21a. See generally *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), petitions for cert., Nos. 95-509 & 95-520.

In the end, petitioners' claims would effectively preclude the Commission from developing and elaborating upon "Congress's declared policy of banning indecency from the air-waves during certain hours of the day." Pet. App. 19a. There is nothing inherently unconstitutional about administrative enforcement of otherwise lawful government regulation of speech. In this case, moreover, the Commission's

expertise and policy judgment are especially well-suited to resolution of the factual and contextual issues that underlie indecency determinations. *FCC* v. *Pacifica Found.*, 438 U.S. at 742, 750; see *Sable Communications of Cal., Inc.* v. *FCC*, 492 U.S. 115, 130 (1989).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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